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The Sheriff in the Heather: Beaton v Ivory

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Abstract

This essay was written for publication in a collection which examines in detail the background to various leading Scots cases prior to the twentieth century. The case in question, *Beaton v Ivory*, decided in 1887, was to become one of the leading Scots authorities limiting liability in delict/tort on the part of public officers for wrongful deprivation of liberty. But while this case has been frequently cited, little attention has been paid to the controversial circumstances from which it arose. This essay traces the troubled background of the Crofters' War in the Scottish Highlands in 1880s and suggests the importance of that context to the outcome of the case. It goes on to evaluate the continuing significance of the case as an authority in the modern law.

Keywords

Law, delict tort, deprivation of liberty, Scottish Highlands, Crofters' War nineteenth century

The Sheriff in the Heather: *Beaton v Ivory**Elspeth Reid*

The case of *Beaton v Ivory*¹ comes from one of the most remote locations the Scottish law reports – the township of Herbusta in the Kilmuir Estate on the north-western tip of the Isle of Skye. Against the dramatic backdrop of the Trotternish ridge, Herbusta looks west over the Minch towards the mountains of Harris. Immediately to the north is the windswept Kilmuir graveyard where Skye's most famous daughter, Flora Macdonald, lies buried. Today Herbusta is extraordinarily tranquil, but on 27 October 1886 the scene was very different. On that day Sheriff William Ivory led a force of 70 police and troops into the township, bent on rounding up the ringleaders of a riot that had taken place two days previously. On failing to locate the rioters, he ordered the arrest of John Beaton, one of the very few men left in Herbusta that afternoon. After being imprisoned for three days and released without charge, Beaton made an unsuccessful claim against Ivory for wrongful arrest. It was a litigation in which the backgrounds of the parties could not have been more different. Beaton was the cowherd for this remote community; Ivory, on the other hand, was as Sheriff of Inverness, Elgin and Nairn the most senior judge presiding over the courts in this area.² *Beaton v Ivory* became one of the leading Scots cases in this area of law, but although it has been cited regularly in the courts right up into the twenty-first century,³ scant regard has been paid to the significance of the troubled times in which it was set.

THE CROFTERS' WAR IN SKYE

The 1880s were the period of the "Crofters' War" in Skye.⁴ The fundamental source of grievance for the crofter-fishermen of the north-west was that, despite emigration, land distribution was increasingly inadequate. The subdivision of crofting land between families reduced its quality and diminished its capacity to sustain the population and its livestock. At the same time, rents continued to rise, even although much of the better land had been lost to create larger farms, often to graze sheep, or in some cases to create lucrative shooting tenancies.⁵ As the *Glasgow Herald* "special correspondent" reported from Kilmuir: "The pitiable condition of the people – the hovels in which they are housed, the sterile soil from which, with much toil, they scrape a scanty sustenance – combined with the gradual limitation of privileges...which they formerly enjoyed, have reduced the crofters almost to despair".⁶ And while the Irish had their Land Reform Act in 1881, legislative intervention was not yet promised in Scotland. Indeed it seems plausible to link growing unrest in Scotland to an awareness of progress on land issues elsewhere,⁷ but Irish influence should not be overestimated.⁸ Local causes for discontent in the

*The author wishes to express her thanks to the staff of the Skye and Lochalsh Archive Centre, Portree, for their kind assistance.

¹ (1887) 14 R 1057.

² Also son of Lord Ivory, Court of Session judge, and father of James, accountant and founder of Ivory and Sime investment managers, and Holmes, prominent Edinburgh lawyer.

³ E.g. *Mckie v Orr* 2003 SC 317.

⁴ I M M MacPhail, *The Crofters' War* (1989) 1-5.

⁵ A Mackenzie, *The Isle of Skye in 1882-1883* (1883).

⁶ *Glasgow Herald* 22 April 1882, 5.

⁷ See MacPhail, *Crofters' War* 5.

⁸ On "willingness to see malign Irish hands behind every unwelcome development" see E Cameron, "Communication or Separation? Reactions to Irish Land Agitation and Legislation in the Highlands of Scotland, c. 1870-1910" (2005) vol CXX no 487 *English Historical Review* 633, at 665.

Scottish crofting counties were ample and pressing and the proponents of reform found vocal support nearer to home.

The owner of the Kilmuir Estate, Captain William Fraser, had acquired a reputation for want of sympathy that marked him out even from the other Skye landlords. A revaluation of the land on his estate in 1876, had resulted in swingeing rent increases the following year. The tenants' opposition was vehement, and indeed when in October 1877 a storm of biblical force devastated Uig Lodge, Fraser's Skye residence, *The Highlander* newspaper suggested divine retribution.⁹ The publicity generated by this dispute led to the formation of the "Skye Vigilance Committee" in Glasgow in May 1881, pledged to "watch the future dealings of Captain Fraser".¹⁰

But there was unrest too in other areas of the island. In Glendale grievances over grazing land escalated into more serious disturbances towards the end of 1882.¹¹ And perhaps the most famous incident in the Crofters' War was the so-called "Battle of Braes", fought on the Braes peninsula not far from Portree. The immediate *casus belli* was a dispute with the landlord, Lord MacDonald, concerning common pasturage turned over to sheep-farming. When the aggrieved tenants withheld rent, a sheriff officer was sent in to serve summons to remove them. He was met by a crowd who seized the summonses and burned them, then sent him and his colleagues back to Portree, unharmed, but in little doubt as to the contempt in which these legal documents were held. In response, Sheriff Ivory requested reinforcements for the local constabulary, and an additional fifty officers were drafted into Skye from Glasgow and Inverness. On April 19 1882 this brigade marched on Braes, through torrential rain, to arrest the ring-leaders of the earlier disturbance. Five crofters so identified were arrested,¹² but the local populace swiftly assembled, and attempted, with sticks and stones, to resist the prisoners' removal. The ensuing stramash, resulting in several serious injuries although no fatalities, was widely reported,¹³ and came to be regarded as one of the defining moments of the crofters' campaign.¹⁴

An important feature of the Battle of Braes was that the force was commanded on the ground by the intrepid Sheriff Ivory himself. From a modern perspective, the propriety of a Sheriff placing himself at the head of a combined police and military force might seem questionable, but, aside from his judicial functions, superintending the local police force was one of the regular administrative duties of the Sheriff of that era. The Police Scotland Act 1857 provided that Chief Constables directed their forces subject to the Sheriff's orders,¹⁵ and sheriffs

⁹ On Fraser's action for verbal injury see *Scotsman* 12 April 1878; the defender's account is at J Hunter (ed), *For the People's Cause: From the Writings of John Murdoch* (1986) 156-158.

¹⁰ Fraser ultimately conceded errors in the 1876 valuation: MacPhail, *Crofters' War* 33; D W Crowley, "The 'Crofters' Party', 1885-1892" (1956) 35 *Scottish Historical Review* 110 at 112.

¹¹ See *MacLeod's Trustees v Macpherson* (1883) 10 R 792. The crofters defied an interdict excluding them from the disputed ground and forced the retreat of police sent to restore order. Five ring-leaders eventually served two months' imprisonment for breach of interdict, but met a heroes' welcome on release from Edinburgh's Calton Jail (*Scotsman* 16 May 1883, 10). One of the "Glendale Martyrs", John MacPherson, continued campaigning eloquently for land reform: for his evidence to the Napier Commission (note 21 below), see vol 1, paras 6500-6814.

¹² For a transcript of their trial see Mackenzie, *The Isle of Skye in 1882-1883* 36-89; *Scotsman* 12 May 1882, 6. All were convicted, although on a charge of simple assault, with trifling penalties, not the serious charge of deforcement.

¹³ Mackenzie, *The Isle of Skye in 1882-1883* 32-33. Various newspaper correspondents followed the expedition: see, e.g. *Glasgow Herald* 20 April 1882, 5; *Times* 20 April 1882, 6.

¹⁴ See J Hunter, "The Scottish Land Court's Revolutionary Origins", in Scottish Land Court, *No Ordinary Court* (2012) 1 at 10, tracing the Court's origins to this "Battle"; also the Court's website at <http://www.scottish-land-court.org.uk/centenary.html>.

¹⁵ Section VI. (Cf Police and Fire Reform (Scotland) Act 2012, s 17(3).)

also had common law powers to preserve order by calling in military force.¹⁶ Indeed, it was they who were empowered to “read” the Riot Act of 1714, still in force at this time. Sheriff Ivory could not therefore be regarded as having exceeded his powers simply by virtue of leading the march across the heather to Braes. Nonetheless, it was highly unusual by the 1880s for Sheriffs to adopt such an active role in quelling unrest,¹⁷ and Sheriff Ivory’s behaviour could hardly be regarded as conciliatory in the tense situation then overtaking Skye.

The Napier Commission

By the early 1880s the troubles in Skye were capturing headlines not only locally but in the national press,¹⁸ and on the mainland the Highland Land Law Reform Association was campaigning vigorously for the crofting cause.¹⁹ Finally the Home Secretary, Sir William Harcourt, announced on 19 March 1883 the appointment of a Royal Commission, chaired by Lord Napier, “To inquire into the condition of the crofters and cottars in the Highlands and Islands of Scotland”.²⁰ Over the ensuing months the members of the Napier Commission toured the crofting counties hearing evidence from over 700 witnesses and producing a 4,000-word report,²¹ but the sentiments of the very first witness, Angus Stewart from Braes,²² were echoed by most of those crofters who followed:²³

“The smallness of our holdings and the inferior quality of the land is what has caused our poverty; and the way in which the poor crofters are huddled together, and the best part of the land devoted to deer forests and big farms. If we had plenty of land there would be no poverty in our country. We are willing and able to work it.”

The testimony from the Kilmuir estate underlined similar concerns: the essential problem was the insufficiency of crofting land, both in extent and in quality.²⁴

¹⁶ J C Dove Wilson, “Sheriff; Sheriff Court”, in J Chisholm (ed) *Green’s Encyclopaedia of the Law of Scotland* (1st edn) vol 11 (1899) 305 at 324.

¹⁷ A notable 19th-century example was Archibald Alison, Sheriff of Lanarkshire, summoning the cavalry in 1835 to control sectarian violence, and in 1837 to assist during a general strike, himself heading the force that arrested the ringleaders: A Alison, *Some Account of My Life and Writings: An Autobiography* (Lady Alison, ed, 1883) vol 1, 359-361, 369-385.

¹⁸ E.g. *Times* 24 April 1882, 11 (Editorial): “Even should we hear no more of riots in Skye, the disturbances which have occurred ought not to be forgotten...we have had a sharp lesson as to the impolicy of allowing such evils to accumulate.”

¹⁹ For its 1884 manifesto see MacPhail, *Crofters’ War* 97.

²⁰ Hansard HC 19 April 1883, 3rd series, vol 277, cols 796-797. Lord Napier was a Borders landowner and former diplomat. The Commission’s other members were Sir Kenneth Mackenzie, Lord Lieutenant of Ross and Cromarty, Donald Cameron of Lochiel, former diplomat and Tory MP for Inverness, Charles Fraser Mackintosh, MP for the Inverness Burghs, Sheriff Nicolson, Skyeman and Sheriff at Kircudbright, and Donald MacKinnon, Professor of Celtic at Edinburgh University.

²¹ *Report of Her Majesty’s Commissioners of Inquiry into the Condition of the Crofters and Cottars in the Highlands and Islands of Scotland* C.3980-I,C.3980-II,C.3980-III,C.3980-IV, vols XXXII.1, XXXIII.1, XXXIV.1, XXXV.1, XXXVI.1 (1884).

²² Stewart’s croft became, much later, the home of the poet, Sorley MacLean: Hunter “Scottish Land Court’s Revolutionary Origins” at 6.

²³ Note 21 above, “Minutes of Evidence”, para 23.

²⁴ Donald Beaton from Herbusta argued for security against evictions and rents increases, land valuation by the Government, and access to hill pasture. Despite loss of pasture his rent increased from £5/15/- in 1864 to £8/10/- in 1880, and only one of the eight Herbusta families had paid the previous year’s rent in full. (Napier Commission, note 21 above, “Minutes of Evidence”, paras 2188-2243.)

The Napier Commission reported in 1884, although not unanimously.²⁵ Its recommendations – to create greater security of tenure and community management of the townships – were criticised by the landowners as too radical,²⁶ and by the crofting lobby as falling short of what had been achieved in Ireland. The result was political stalemate.²⁷ Disappointed expectations and impatience at government inaction led to renewed agitation in the crofting community, withholding of rent, and appropriation of grazing. In November 1884, in the face of growing lawlessness across the island, including in particular on the Kilmuir Estate, Sheriff Ivory succeeded in persuading the Lord Advocate, Sir John Balfour, that a two gun boats and 350 marines should be sent to Skye.²⁸ This expedition was attended by a press corps of sixteen reporters and two newspaper artists;²⁹ the crofting disturbances of this period, as well as Sheriff Ivory's response thereto, were increasingly the focus of a highly visible media campaign.

After some weeks the military departed Skye without significant confrontation, but without resolution of the problems that had brought them there.³⁰ It was not until 25 June 1886 that the Crofters' Holdings (Scotland) Act 1886 was passed,³¹ providing for a degree of security of tenure, compensation for improvements made by the tenant, and limited possibilities for groups of crofters to extend holdings.³² Very importantly, it also established the Crofters' Commission, empowered to fix fair rents and to adjust arrears.³³ The Crofters' Commission was rapidly constituted, chaired by Sheriff David Brand of Ayr, and in future years it was to reduce rent and arrears by significant amounts,³⁴ but its procedures could not be initiated immediately, and it was not scheduled to reach Skye until March 1887.³⁵ In the closing months of 1886, therefore, the situation on the island remained fraught.

Continuing Unrest on the Kilmuir Estate

While in 1880 the level of bad debt on the Kilmuir Estate was negligible, by the mid-1880s widespread default on rent was creating serious problems. In June 1880 rent arrears stood at £63/3/7½, with only £2/12/6 marked as bad debt.³⁶ By March 1885 the estate manager had listed 72 tenants to receive a summons for non-payment of rent,³⁷ and by early 1887, arrears totalled £10,000, with only £16 paid for the last quarter.³⁸ Meanwhile, as a result of this diminishing cash flow, Fraser, like other landlords, was himself being pursued for unpaid rates

²⁵ Mackenzie and Cameron dissented on issues of land management (note 21 above, vol I, 113 and 119).

²⁶ See, e.g., Duke of Argyll, "A Corrected Picture of the Highlands" (1884) 16 *Nineteenth Century* 681.

²⁷ For analysis see E Cameron, *Land for the People* (1996) 17-28; J A Cameron, "Storm Clouds in the Highlands" (1884) 16 *Nineteenth Century* 379.

²⁸ *Papers relating to Despatch of Government Force to Skye* (C 1257, 1884).

²⁹ MacPhail, *Crofters' War* 117.

³⁰ John MacKenzie, Kilmuir Estate Manager, reported the crofters would "pay no Rents at present until a Bill is brought in to Parliament on their behalf" (letter to Fraser of 7 March 1885). By 12 September 1885, MacKenzie could not "convince them to pay a penny", especially with "agitators making out to the tenants Government will pay the arrears for them as was done in Ireland". (Skye and Lochalsh Archive, Christie & Ferguson papers, GB3219/D123/2).

³¹ On the making of the 1886 Act see Cameron, *Land for the People* 28-39.

³² Ss 1-2, 8-9 and 11-13 respectively.

³³ Ss 6 and 17.

³⁴ In 1887 the Commission reduced Kilmuir rents by 1/3 and cancelled 2/3 of arrears (MacPhail, *Crofters' War* 199).

³⁵ MacPhail, *Crofters' War* 178-180.

³⁶ Statement by Fraser to Crofters' Commission 20 April 1887. Skye and Lochalsh Archive, Inverness County Council Records, SL/D123/37.

³⁷ Christie & Ferguson papers, GB3219/D123/2.

³⁸ Statement to the Crofters' Commission 20 April 1887.

and tax bills, and since, increasingly, neither crofters nor landlords were paying rates, the funds were drying up for public services such as schools and poor relief. The archive of the Kilmuir factor, Alexander Macdonald, contains letters of demand from the Inland Revenue during this period, as well as increasingly urgent correspondence regarding collection of rent arrears³⁹ in anticipation that when it eventually arrived in Skye the Crofters' Commission might adjust the amount owed.⁴⁰ But increasingly not only were the tenants resisting the service of summonses or notices to quit, the sheriff officers themselves were refusing to go into the townships where they feared for their personal safety.⁴¹

A general election in July 1886 resulted in the defeat of the Gladstone administration and the return of a Conservative government. While Sheriff Ivory's renewed requests for military support had earlier met a dusty response, the incoming Secretary of State for Scotland, Arthur Balfour, immediately declared his commitment "to restore to something like law and order the disturbed districts of the Western Highlands and Islands".⁴² Almost as soon as he took office he authorised 250 marines and 50 police to be sent to Tiree, and in October 1886 a further contingent of marines was despatched to Skye.

EVENTS OF 27 OCTOBER 1886

Official intransigence and determined resistance in the crofting community thus form the background to the events of 27 October 1886. Two days previously a Sheriff Officer supported by police had been sent to the township of Bornaskitaig, adjacent to Herbusta, to serve summonses on various crofters for non-payment of rent. They met with vigorous resistance from a large jeering crowd throwing missiles and clods of manure, although no significant injury was inflicted. It was only by summoning the marines, who advanced with fixed bayonets, that the party was able to retreat, taking with them six of the ringleaders of the affray. Meanwhile, across the moor in Herbusta, Sheriff Officer Alexander Macdonald⁴³ had met with similar opposition in attempting to serve summonses for non-payment of rates.

In response, a combined force of seventy police and military personnel was mustered to round up those responsible, and once again it was led in person by Sheriff Ivory. No arrest warrants had been prepared because Macdonald had not been able to put a name to the miscreants two days previously, but he was in attendance, confident that he would recognise the faces of suspects. The party left Portree at seven in the morning of 27 October on the gunboat, *Seahorse*, sailing round the Trotternish peninsula in clear weather, so that by the time that it reached shore in Duntulm Bay, sentinels posted along the hills had given the local residents generous warning of its arrival. In the account of the *Glasgow Herald* reporter,⁴⁴ the force made a leisurely pace across the moor, going first to Bornaskitaig which it found deserted. All the men had taken to the hills, leaving only women and children in the village, mostly behind closed

³⁹ Christie & Ferguson papers, GB3219/D123/2. There was also discussion of a dispute over grazing at Garrafad. Interdict against the tenants and their minister was refused in the local sheriff court, but Sheriff Ivory, and the Court of Session, found for the landlord on appeal: *Macleod v Davidson* (1886) 14 R 92.

⁴⁰ See *Fraser v Macdonald* (1886) 14 R 181: ordinary courts' jurisdiction to grant decree against tenants for non-payment of rent not suspended by tenant's application to the Crofters' Commission to fix a fair rent and adjudicate arrears.

⁴¹ J Hunter, *The Making of the Crofting Community*, revised edn (2010) 213.

⁴² Hansard HC 31 August 1886, 3rd series, vol 308, col 955.

⁴³ Sheriff Officer Macdonald later achieved notoriety for poinding a cradle, with infant occupant, as a job lot valued at 6d: see *Glasgow Herald* 26 November 1886, 7.

⁴⁴ *Glasgow Herald* 28 October 1886, 7.

doors. Herbusta was similarly abandoned. The party found neither the suspected rioters, nor anyone who could assist in ascertaining their whereabouts. As the troop paused to consider, a lone figure was spotted on the hillside. This was John Beaton, then in his late forties,⁴⁵ who as the local herdsman remained to mind the cattle. Sheriff Ivory, in exasperation, ordered that Beaton should be brought down from the hill, and that “every blessed place”⁴⁶ in the township was to be searched. Beaton offered no resistance but his explanation that he had not been present at the riot was corroborated by other witnesses. For a further two hours Sheriff Ivory ordered his men to comb the township. As an incentive he produced one of the special medals⁴⁷ that he personally had commissioned earlier that year to reward police officers who arrested rioting crofters, promising that this would be awarded to any arresting officer that day. Despite this inducement, the only other arrest made was of a young woman, whom Macdonald pointed out as a rioter, although she strenuously denied involvement. Beaton meantime calmly smoked his pipe, accepted from his wife a change of clothes to go to Portree, and called out as he was led away that someone should mind the cows.⁴⁸

Having taken just two prisoners – one middle-aged man and one young woman – the 70-man detachment then set off again in the late afternoon, stopping, just in case, at the Kilmuir graveyard to search (in vain) among the tombstones for stragglers. The prisoners were marched down to the shore to the *Seaborse*, and taken to Portree. Other arrests were made later and charges were brought against the Bornaskitaig and the Herbusta rioters,⁴⁹ but Beaton himself was questioned briefly by the Sheriff-Substitute, detained in Portree Prison for three days, then released without charge and without explanation.

Before setting out to walk the 25 miles home to Herbusta, however, Beaton apparently made enquiries in Portree on obtaining compensation. Although a local law agent reportedly counselled him that “he had better leave matters as they are”,⁵⁰ others further afield plainly advised him differently. The Skye disturbances had been extensively reported locally and nationally, and various funds had been established to assist the crofters with the legal costs of the Crofters’ War. In particular the *North British Daily Mail*, owned by Dr Charles Cameron, a Liberal MP, launched a “Crofters Rights Vindication Fund” in November 1886, and a specific appeal for the fund was published in the issue of 12 March 1887. It seems likely, therefore, that Beaton received not only funds but advice and support from this quarter.

PROCEEDINGS IN *BEATON v IVORY*

So it was that John Beaton raised an action in the Court of Session against William Ivory claiming £500 in damages for wrongful arrest and detention. Beaton had engaged John

⁴⁵ Census of 1881 gives his age as 43.

⁴⁶ *Glasgow Herald* 28 October 1886, 7.

⁴⁷ With the inscription: “For zeal and activity. From Sheriff Ivory.”

⁴⁸ *Glasgow Herald* 28 October 1886, 7.

⁴⁹ The Herbusta accused included Donald Beaton, Napier Commission witness (note 24 above). Their trial, on charges of mobbing, rioting and deforcing a sheriff officer, is reported at *Scotsman* 4 January 1887, 7. The jury found them guilty but, given “no excess of violence”, requested “utmost leniency”.

⁵⁰ *Glasgow Herald* 1 November 1886, 7.

Comrie Thomson as his advocate.⁵¹ Ivory attempted unsuccessfully to persuade first the Lord Advocate and then the Solicitor General to conduct his defence in the case, but was eventually represented by William Mackintosh, Dean of the Faculty of Advocates.⁵² The case was heard on the Procedure Roll before Lord Fraser in the Outer House on 19 May 1887 for preliminary discussion on the relevancy of its legal issues.⁵³ The defence was that even without a written warrant no wrong was committed by Ivory in ordering Beaton's arrest where he had "probable cause" to suspect that an offence had been committed and he had acted without "malice". Probable cause, counsel argued, was suggested by the disturbances two days previously, and personal malice was contradicted by the non-specific nature of the Sheriff's instructions to round up all men found in Herbusta. The pursuer on the other hand doubted it could be "right that because a crime had been committed in a certain township policemen were to scour the country and bring in any man that they saw": the defender was obliged "to use his official powers with discretion".⁵⁴

Lord Fraser ruled that want of probable cause and malice were both essential requirements in a case of this nature. Malice, in his interpretation, could not be established if, as accepted by both sides, the defender had issued "general instructions" to apprehend all in the township, "unless indeed it be meant to be averred that the Sheriff had malice against the whole population of crofters". The action was therefore dismissed as irrelevant, with Lord Fraser reflecting that "If the chief magistrate of a county... were to lie under the threat of actions of damages for what he did in the bona fide execution of his duty, the result would be that his powers to quash tumult and insurrection would be altogether paralysed."⁵⁵

Beaton appealed to the Inner House. On the matter of probable cause, his counsel's argument was that if, as here, an arrest was ordered without a warrant:⁵⁶

"it must be because the person to be apprehended had been seen in the act of committing a crime, or there was reasonable ground for believing that he had committed a crime. But a general order to apprehend all persons in a locality was very different. There was therefore a *prima facie* case for an issue of this kind, viz., whether the pursuer was apprehended by order of the defender wrongfully and illegally given."

On the question of malice he reasoned that⁵⁷

"it was not necessary to aver or prove personal malice. If a reckless disregard of the rights and liberties of others was proved, that was enough. What was done here by the defender was in itself illegal. If it had been legal, but carried out in a harsh and oppressive way, then no doubt the pursuer would have been obliged to take an issue of malice, and facts must have been averred from which to deduce the malice."

⁵¹ Comrie Thomson was to have a highly successful practice. One of his best-known cases was *HM Advocate v Monson* (1893) 21 R (J) 5, the "Ardlamont murder", in which his defence secured a verdict of not proven, notwithstanding damning circumstantial evidence.

⁵² Later to become Lord Kyllachy.

⁵³ See *Scotsman* 20 May 1887, 7. Arguments were also heard on the relevancy of the defamation action by Norman Stewart of Valtos claiming Ivory had dubbed him the Skye "Parnell". That action was held relevant but settled on Stewart accepting Ivory's tender of £25: *Scotsman* 1 July 1887, 8.

⁵⁴ Report at *Scotsman* 20 May 1887, 7.

⁵⁵ (1887) 14 R 1057 at 1059

⁵⁶ *Ibid*, 1059-1060.

⁵⁷ *Ibid*, 1060.

The appeal was nonetheless unsuccessful. Lord President Inglis recognised “a kind of recklessness... about an order that everybody in a locality should be apprehended”.⁵⁸ But the sticking point, as in the Outer House, was the Court’s insistence that it was necessary to prove *both* want of probable cause *and* malice, and reflecting on the meaning of malice in this context Lord President Inglis stated:⁵⁹

“The presumption in favour of a public officer that he is doing no more than his duty, and doing it honestly and *bona fide*, is a very strong one, and certainly ought not to be overcome by the simple use of the word ‘malice.’ I think the duty of the pursuer in a case of this kind is to aver facts and circumstances, from which the Court or a jury may legitimately infer that the defender was not acting in the ordinary discharge of his duty, but from an improper or malicious motive.”

Again, the agreed circumstance that Ivory had ordered the arrest of everyone in sight in Herbusta was inconsistent with personal malice in this sense. In effect, the indiscriminate nature of the Sheriff’s orders – the aspect of his conduct most problematic to modern eyes – was the very quality that put it beyond challenge and precluded further enquiry into its reasonableness or proportionality.

Moreover, in legal usage “malice in fact” has traditionally been distinguished from “malice in law”; the former takes the literal sense of being motivated by “ill will against a person”, whereas the latter is inferred from “a wrongful act, done intentionally, without just cause or excuse” – in effect collapsing into the general notion of deliberate conduct normally understood in all the intentional delicts.⁶⁰ The Lord President’s judgment emphasised the need for malice in this more pointed first sense – that the defender was inspired by malicious motive against the pursuer in particular. In practice this conferred a near-absolute degree of privilege on the defender. Cases of this type typically arise between strangers, as in *Beaton*, so that any question of personal animosity is often absurd, but in any event it is extraordinarily difficult to prove subjective motivation even on the part of individuals with whom one has a prior acquaintance.⁶¹ The malice requirement thus formulated was therefore to present an insurmountable hurdle not only for *Beaton* but also for future litigants referred to Lord President Inglis’ dictum.

But should malice have been insisted upon, and if so, was malice correctly understood?

MALICE AND WRONGFUL ARREST

Then as now, in intentional wrongs against the person, such as assault or deprivation of liberty, malice in a general sense was most often inferred without specific enquiry.⁶² The requirement specifically to prove malice reasserted itself only in circumstances which were

⁵⁸ Ibid, 1061.

⁵⁹ Ibid, 1061.

⁶⁰ *Bromage v Prosser* (1825) 4 B & C 247, Bayley J at 255; *Ferguson v Earl of Kinnoul* (1842) 1 Bell 662, Lord Campbell at 730; *Shields v Shearer* 1914 SC (HL) 33, Lord Dunedin at 35; G Fridman, “Malice in the Law of Torts” (1958) 21 MLR 484.

⁶¹ See e.g. *Mckie v Orr* 2003 SC 317 for problems of establishing malice on the part of former colleagues.

⁶² Bell, *Principles*, § 2044; R H Maconochie, “Malice”, in Lord Dunedin (ed) *Encyclopaedia of the Laws of Scotland* vol 9 (1930). 361 at 363; F Pollock, *The Law of Torts* (1st edn, 1887) 236).

somehow privileged, the context of law enforcement being a prime example. In the nineteenth century, as in the twentieth, malice was thus a necessary ingredient in civil wrongs that constituted abuse of process, such as malicious prosecution or malicious use of diligence,⁶³ and the court in *Beaton* had taken note of several cases of this type.⁶⁴ The court also observed that malice was an essential element in judicial slander,⁶⁵ as well as in reparation cases brought against members of the public whose complaints to the police had resulting in an innocent person being detained.⁶⁶ Public order required that individuals should be able to report suspected crime without undue fear of litigation. An analogy could be drawn therefore with cases of alleged defamation, which were protected by privilege where the individual had a social duty to report information and the recipient had an interest to receive it.⁶⁷ But the circumstances of *Beaton v Ivory* did not fall into any of these specific privileged categories.

Beaton v Ivory presented a case of alleged wrongful arrest without a warrant – not slander, nor malicious or wrongful prosecution, since no proceedings had been brought against Beaton. The basic rule in relation to arrest was simply stated in the Scots textbooks of the period: “where the [arrest] warrant is legal and regular, the party cannot claim damages, unless he avers and puts in issue malice and want of probable cause; but ... he will not be obliged to do this where there was no warrant, or the warrant was illegal”.⁶⁸ This was essentially the same general rule to be found in the contemporary English commentaries. Arrests might be made without warrant only where there was “probable cause” to suspect that an offence had been or was about to be committed, and any questions of wrongful intention were subsumed into the enquiry as to cause.⁶⁹ Without “probable cause” the arresting officer’s actions could not be regarded as privileged, and the arrest was *prima facie* actionable, although very considerable latitude might be allowed in determining what constituted “probable cause”.⁷⁰ There is nothing in the Scots case law cited in *Beaton v Ivory* to suggest that the Scots practice up until that point had been significantly different.

In short, therefore, the assertion by the court of a malice requirement in cases of arrest without probable cause was not clearly supported by the earlier cases to which the court referred. And there was no authority for a rule of general application, beyond the contexts already noted, insisting that malice be proved in all claims brought against “public officers” purporting to do their “duty” even if acting recklessly.

⁶³ In English law too, abuse of process was one of the “few” torts requiring proof of malice: F Pollock, *The Law of Torts*, 1st edn (1887) 264.

⁶⁴ *Arbuckle v Taylor* (1815) 3 Dow 160 (second defender); *Rae v Linton* (1875) 2 R 669. Cf *Craig v Peebles* (1876) 3 R 441 (notwithstanding malice, action must fail where there *had* been probable cause).

⁶⁵ *Scott v Turnbull* (1884) 11 R 1131.

⁶⁶ *Arbuckle v Taylor* (1815) 3 Dow 160 (first defender); (1880) 8 R 31 *Denholm v Thomson* (1880) 8 R 31; *Hassan v Paterson* (1885) 12 R 1164.

⁶⁷ *M'Murphy v Campbell* (1887) 14 R 725; *Bayne v Macgregor* (1863) 1 M 615; *Urquhart v Grigor* (1864) 3 M 283; *Cameron v Hamilton* (1856) 18 D 423.

⁶⁸ J Badenach Nicolson in his 1871 edition of Erskine, *Institute*, 4.4.31, note (a); also Bell, *Principles*, §§ 2036-2040. As noted by Lord Fraser at 1059, sheriffs witnessing an offence had common law powers to have the offender arrested, or could do so on receiving a report of an offence, where there was “certain knowledge of the fact, and the person of the offender” and a likelihood of escape. (Baron Hume, *Commentaries on the Criminal Law of Scotland* 3rd edn (1829) vol 2, 75.) But Ivory had not seen Beaton offending, there was no “certain knowledge” linking him to the riots, and Beaton showed no inclination to abscond.

⁶⁹ See e.g. C G Addison, *Addison on Torts: A Treatise on Wrongs and their Remedies* 6th edn by H Smith (1887) 151.

⁷⁰ F Pollock, *The Law of Torts*, 1st edn (1887) 192-193; *Hogg v Ward* (1858) 3 H & N 417; 157 ER 533.

Even if it were accepted that malice was an essential element, it is doubtful that this should have been understood in the exacting sense of “malice in fact”, as distinct from “malice in law”. The authorities cited in *Beaton v Ivory* had pointed to the latter meaning in this context.⁷¹ In a recent case malice had been understood as “not necessarily personal hostility or ill-will, but...a thing done against duty, with a reckless disregard of an individual’s interests or feelings will, in the sense of the law, be a thing done maliciously.”⁷² This meant that it was “necessary for the party aggrieved to shew that the act complained of was maliciously done—in other words, with undue disregard to the rights of persons”.⁷³

It is of course by no means self-evident that Beaton’s claim would have succeeded had the court not demanded that malice be present and had the case been allowed to turn on the question of probable cause for the Sheriff’s actions. The court clearly viewed the earlier riots as “of a very serious character”,⁷⁴ and there was considerable sympathy for providing a “shield” for public officials in such circumstances.⁷⁵ Nonetheless, at a time when the founder of the Irish Land League was addressing the disaffected crofters of Skye,⁷⁶ and controversy surrounding Ivory was growing, it was certainly convenient that insistence upon “malice in fact” effectively eliminated the need for further examination of the reasonableness of his conduct.

LEGAL LEGACY

The malice requirement in claims brought against “public officers”, as formulated by Lord President Inglis,⁷⁷ hardened into a general rule that continued regularly to be cited for a century or more in Scottish cases – invariably without reflection upon the extraordinary circumstances on the Herbusta hillside, or the equivocal nature of the authorities cited in *Beaton v Ivory*. This dictum found its way into cases brought against the police not only in relation to wrongful detention but also other intentional wrongs such as defamation⁷⁸ or assault,⁷⁹ making them actionable only if “actuated by malice”, in interpreted in the more exacting sense of “malice in fact”.

Unsurprisingly, this rule is now tested by human rights considerations, as demonstrated by the decision of the European Court of Human Rights (ECtHR) in the English case of *Keegan v United Kingdom*.⁸⁰ In *Keegan* the applicants’ house had been searched by the police on the authority of a warrant procured without malice, but in reliance upon mistaken information. In the English courts a claim for damages against the Chief Constable failed in the absence of malice.⁸¹ The ECtHR held, however, that insistence

⁷¹ See e.g. *Hassan v Paterson* (1885) 12 R 1164.

⁷² *Urquhart v Dick* (1865) 3 M 932, Lord Kinloch at 934; also *Cameron v Hamilton* (1856) 18 D 423, Lord Deas at 427: “Actual malice – that is personal enmity... – is not necessary. Gross recklessness and culpa lata are enough. The want of probable cause goes deep into the question of malice as thus defined.”

⁷³ *Denholm v Thomson* (1880) 8 R 31, Lord Moncreiff at 33.

⁷⁴ Lord President Inglis at 1061.

⁷⁵ Lord Shand at 1063.

⁷⁶ Michael Davitt addressed a rally in Portree on 2 May 1887 and thereafter toured the island.

⁷⁷ Text at note 59 above.

⁷⁸ *Robertson v Keith* 1936 SC 29.

⁷⁹ *Mckie v Orr* 2003 SC 317, Lord Kirkwood at para 12.

⁸⁰ (2007) 44 EHRR 33.

⁸¹ [2003] EWCA Civ 936; [2003] 1 WLR 2187.

upon proving malice, without regard to proportionality and reasonableness, presented an unreasonable barrier to compensation and that: “a limitation of actions for damages to cases of malice is [not] necessary to protect the police in their vital functions of investigating crime”.⁸² Accordingly, the domestic courts had offered inadequate redress for interference with the applicants’ rights under Article 8 of the European Convention on Human Rights.

If it is disproportionate to look for malice in determining liability for wrongful procurement of a warrant to search premises, it cannot be regarded as less so in cases involving infringement of liberty. The ECtHR in *Keegan* made no specific suggestions as to what should replace the malice criterion in determining the boundaries of privilege for public officials. The appropriate test will require further judicial elaboration in the domestic courts, but at the very least it must now involve proportionality, and turn upon objectively verifiable standards, rather than the personal motivation of the defender. In short, Lord President Inglis’ dictum can no longer be accepted as representing the modern law.

POSTSCRIPT

While Beaton had his legal expenses paid by public subscription, Ivory was faced with a long battle to obtain public funding to meet his costs. It was not until March 1888 that he eventually secured a Treasury payment of £151/15/6 to his agents to reimburse them for the expenses that he plainly would not recover from Beaton.⁸³ And while Ivory avoided legal liability, his conduct in Skye had nonetheless made him the target of widespread criticism. By the autumn of 1886 he had become embroiled in a bitter dispute with the Chief Constable and the Convener of the County regarding the command of the Inverness police.⁸⁴ He had also been criticised by the Lord Advocate, Lord Kingsburgh (whose grandfather was from Skye), because of his reluctance to censure Sheriff Officer Macdonald for his strong-arm tactics.⁸⁵ In December 1886 a public meeting in London, chaired by Charles Fraser Mackintosh MP, member of the Napier Commission, agreed on a memorial to be sent to the Queen requesting fair treatment for the crofters and an end to the “intolerable conduct” of Sheriff Ivory.⁸⁶ Questions were asked in parliament in early 1887, asking Balfour, the Scottish Secretary, whether Ivory had been reprimanded for his handling of the Skye disturbances.⁸⁷ Indeed by 1887 Ivory was so much the target of vitriol that he had to employ personal bodyguards. Nonetheless, Ivory remained in office until 1900, holding the position of Sheriff for nearly forty years.

⁸² At para 34.

⁸³ “*Stewart and Beaton v Ivory*. Copy of correspondence respecting the payment from public funds of certain expenses incurred by Sheriff Ivory in connection with actions brought against him by Norman Stewart and John Beaton” 1888 (446) *House of Commons Papers* vol LXXXI 545. Controversy continued regarding public funding for Ivory’s expenses in the defamation action by Stewart (note 53 above): Hansard HC 18 March 1889, 3rd series, vol 334, cols 58-93.

⁸⁴ See, e.g., letter from Ivory to James Anderson, Procurator Fiscal, of 5 January 1887, complaining that “the fight” forced upon him had “been so distasteful”; letter from Hugh Davidson of Cantray, Convener of the County to Sir Francis Sandford, of 29 October 1886, urging that “no time should be lost in making some enquiry by some influential person into the actions and conduct of Sheriff Ivory” (both Skye and Lochalsh Archive, Inverness County Council Records, CI 1/9/6/3).

⁸⁵ N Macdonald, *Sir John Macdonald Lord Kingsburgh* (The Lumphanan Press 2010) 111-112.

⁸⁶ *Times* 9 December 1886, 6.

⁸⁷ The response was a guarded negative, Hansard HC 15 February 1887, 3rd series, vol 310, cols 1571-1648.

By the time of the 1891 census, John Beaton was no longer living in Herbusta, and it has not proved possible to trace what became of him. When Ivory died at the age of 90 in 1915, having survived a shipwreck off the Mull of Kintyre in 1895,⁸⁸ he had become the “father” (most senior member) of the Faculty of Advocates. The *Scotsman* glossed over the controversies of a long and active professional life with an unusually lukewarm obituary, pointing out that “as the son of a Judge with an influential Whig connection, preferment did not fail him”, but that “Mr Ivory, although a learned lawyer and endowed with a vigorous mind, had not the peculiar gifts which bring forensic success.”⁸⁹ A more colourful, if thoroughly scurrilous, epitaph came from the Skye bard, Mary MacPherson, composed prematurely in 1886 on false intelligence that Ivory had drowned in the bog at Trotternish:⁹⁰

“A grey stone will certainly be placed above you
Which will record every one of your iniquitous bribes
And how you sold your entire reputation
for a little booty
for the sake of your corrupt ground...”

⁸⁸ See <http://www.nlb.org.uk/LighthouseLibrary/Lighthouse/Sanda/Ivory> was one of the Commissioners of the Northern Lighthouses).

⁸⁹ *Scotsman* 21 October 1915, 6.

⁹⁰ Translation of *Oran Cumha an Ibhich* in D Meek (ed), *Tuath is Tighearna: Tenants and Landlords* (1995) 267 (original at 167).